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KD Employment Law Alert: Joint Employer Standard Continues to Expand

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Overview

In a step that will certainly increase the number of cases where the United States Department of Labor's Wage and Hour Division (the "WHD") will find employers to be "joint employers" (*i.e., two or more companies who together hire or control the employment of one or more employees), the WHD has issued new guidance on the appropriate standard to determine the existence of a joint employment relationship to establish liability for Fair Labor Standards Act ("FLSA") violations. The agency's explicit goal is to ensure that the scope of joint employment relationships is "as broad as possible." Coming directly on the heels of the National Labor Relations Board's expansion of its own definition of a "joint employer" in Browning-Ferris Industries of California, Inc., this new guidance signals a significant policy shift toward broadening the definition of "employer" under various federal labor and employment statutes. In light of this trend, companies must be aware of the potential for significant exposure and liability toward individuals they have not previously considered to be their employees, and for work that may be performed outside of their direct control.*

Noting the growing prevalence of arrangements where multiple businesses are involved in work being performed by an employee, as well as evolving business models which rely on sharing employees or using third-party management companies, independent contractors, staffing agencies, or labor providers, the WHD purports to clarify the tests which should be applied when determining whether a joint employment relationship exists. Such a finding can impact an employee's entitlement to overtime arising from an aggregation of hours worked for each joint employer, as well as determining who the employee may hold liable for payment of wages. Joint employers are jointly and severally liable for compliance with the FLSA, meaning that both companies can be liable for all wages owed to an employee for work performed for either company.

The WHD's guidance focuses on two variations of the joint employer relationship: horizontal and vertical joint employment. Horizontal joint employment arises when an employee has an employment relationship with two or more employers which are sufficiently associated or related with respect to the employee to jointly employ the employee. For instance, horizontal joint employment relationships include a waiter who works at two separate restaurants operated by the same entity, or two employers with an arrangement to "share" a pool of workers between them. Vertical joint employment arises when an employee of one employer (called an intermediary employer) is also, with respect to the work performed for this intermediary employer, economically dependent on another employer. Such a situation may arise, for example, where a construction worker employed by a subcontractor is also employed by the general contractor, or where a company uses a staffing agency to provide clerical workers.

Horizontal Joint Employment

Analysis of a horizontal joint employment relationship focuses on the relationship and degree of association between the two employers, as the employment relationship between the employee and each company is generally undisputed. Some factors to consider in analyzing the degree of association between the potential joint employers include:

- **Complete or partial common ownership of the employers;**
- **Whether the employers have any overlapping officers, directors, executives or managers;**
- **Whether the employers share control over operations (e.g., hiring, firing, payroll, advertising, overhead costs;**
- **Whether the employers' operations inter-mingle (e.g., one person does the scheduling for both companies);**

- Whether one employer supervises the work of the other;
- Whether the employers share supervisory authority over the employee;
- Whether the employers treat the employees as a labor pool available to both of them;
- Whether the employers share clients or customers; and
- Whether any agreements exist between the employers.

The WHD warns that this list is not all-inclusive, and not all of the factors need be present for an employment relationship to exist.

Vertical Joint Employment

In contrast, potential vertical joint employment analysis focuses on the employee's relationship with the potential joint employer, beginning with a determination as to whether the intermediary employer itself has an employee or independent contractor relationship with the potential joint employer. If the intermediary employer is itself an employee, then all of the intermediary employer's employees are necessarily employees of the potential joint employer. If the intermediary employer is an independent contractor, the relationship between the potential joint employer and the employee is subjected to an economic realities test to determine the existence of an employment relationship. The WHD sets forth seven factors as a useful guide to analyze any vertical joint employment case:

- Direction, control, or supervision of the work performed;
- Control of employment conditions;
- Permanency and duration of the relationship;
- Repetitive and rote nature of the work;
- Whether the work is integral to the business;
- Whether the work is performed on the premises; and
- Performance of administrative functions commonly performed by employers.

These factors are merely a guide, and must be applied with a mindful eye toward the ever expanding definition of "employ" set forth in the FLSA. The ultimate inquiry must always be economic dependence of the employee on the potential joint employer.

Conclusion

This new guidance is yet another example of how numerous federal agencies regulating the workplace are expanding the joint employer definition. Therefore, all employment relationships should be clearly defined in writing. Employers need to be more cautious than ever in the types of relationships they establish with employees. Otherwise, increased exposure to unforeseen liability can be devastating.